

**COURT OF APPEALS
DECISION
DATED AND FILED**

FEBRUARY 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1199

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH C. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Joseph Evans appeals a judgment and an order convicting him of four counts of having sexual contact with his fourteen-year-old stepdaughter and denying his postconviction motion. Evans argues that improper and prejudicial evidence was admitted during his trial and that his trial counsel was ineffective for failing to object to that evidence, failing to adequately

investigate the case and failing to call witnesses who would have impeached the victim's credibility. We reject these arguments and affirm the judgment and order.

The State presented evidence that, upon being released from jail, Evans returned home and was informed by his stepdaughter that her mother had been cheating on Evans. Evans' wife and the other children moved out of the house, but the victim stayed with Evans. She testified that four times in a one-month period, Evans touched her breasts and vagina with his hands and mouth. The State also presented evidence from the arresting officer that Evans told him the child would not generally lie, and evidence from the victim's friend that she had witnessed Evans kissing the victim on the lips for approximately ten seconds one year before the sexual assault.

The trial court properly exercised its discretion when it allowed testimony regarding the kiss. The interim between the kiss and the sexual assault is partially explained by Evans' incarceration. The kiss was probative of Evans' motive and intent for intentionally touching his stepdaughter, i.e., sexual gratification. See *State v. Plymesser*, 172 Wis.2d 583, 592-93, 493 N.W.2d 367, 371-72 (1992). This evidence was not offered to prove that Evans acted in conformity with a character trait, but to prove that the contact he had with the victim was for the purpose of sexually arousing or gratifying himself. The kissing incident was also similar to the first sexual assault in that Evans had been drinking at the time of each incident. Finally, the court could properly determine that the probative value of this evidence exceeded its prejudicial effect. The kiss was not a crime. The reference to it was brief. It is not likely the jury would conclude from that incident that Evans should be punished despite a reasonable doubt as to his guilt.

The trial court could reasonably determine that evidence that Evans had just been released from jail was also admissible. That evidence was not offered to establish Evans' general character nor to suggest that he committed the crime in question because of some character trait. Rather, it was offered to explain the absence of the victim's mother from the home, and it explains the gap between the kissing incident and the sexual assault. The evidence that Evans had been in jail was necessary for a full presentation of the State's case. *See State v. Shillcutt*, 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983). Because the defense suggested that the victim fabricated the sexual assault to escape her mother who was physically abusive, it was important for the jury to understand the facts relating to the mother's absence from the home. While some prejudice may result from the jury's knowledge that Evans' had previously been in jail, the prejudicial effect of this testimony does not substantially outweigh its probative value. *See* § 904.03, STATS.

Evans next argues that Detective Schaepe commented on Evans' silence when he testified regarding an interview that took place in Schaepe's squad car. Schaepe testified that he asked Evans what motive the victim would have to lie. Evans had no response. Evans argues that this testimony constituted a comment on his silence. The entire transcript, however, indicates that Evans did not invoke his right to remain silent. Schaepe testified that Evans told him, "No. He had no reason for her to lie. In fact, he said she is basically honest." Schaepe's testimony cannot be reasonably seen to show an invocation of Evans' right to remain silent, but must be construed as Schaepe's conclusion that Evans could not answer an important question posed during the interview.

Evans argues that his trial counsel was ineffective for his failure to make objections to the testimony described above. Because we conclude that all

of this evidence was admissible, counsel was not ineffective for failing to object. While counsel could have requested limiting instructions and should have had Evans explain that the reason he was in jail was drunk driving, Evans has not established prejudice from his counsel's performance. To justify a new trial based on ineffective assistance of counsel, Evans must show that his counsel's performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, Evans must show that his counsel's errors were so serious as to deprive him of a fair trial, one whose results are reliable. *Id.* at 687. Counsel's failure to request a limiting instruction and to inform the jury that Evans' jail sentence was not related to sex crimes does not undermine this court's confidence in the outcome.

Evans next faults his trial counsel for failing to call witnesses to support his theory that the victim made up the whole story. Evans' mother would have testified that she talked to the victim on the telephone around the time when the victim was telling other people of the sexual assault and that the victim did not tell Evans' mother about the assault. Evans' sister would have testified that the victim told her on many occasions that she wanted to be an only child. This, he asserts, would have established her motive for lying. Trial counsel testified at the postconviction hearing that he did not call Evans' mother because her testimony would have been redundant. The victim's statements that she wanted to be an only child does not establish any motive for lying. Evans has established neither deficient performance nor prejudice from his counsel's decisions.

Evans argues that his counsel was ineffective for not calling his brother and sister-in-law who would have testified that the victim was not afraid of Evans as she had testified. They would have testified that during the time when the sexual assaults were occurring, the victim played with Evans' hair and crawled

into a daybed to sleep with him. Trial counsel properly resisted introducing this evidence for fear that it would do more harm than good. The victim's fear was a minor part of the State's case. Further, the victim's getting into bed with Evans might be viewed by the jury as symptomatic of a sexual relationship.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

